OEDCA DIGEST

Vol.V, No. 4 **Department of Veterans Affairs** **Fall 2002**
Office of Employment Discrimination
Complaint Adjudication

Summaries of Selected Decisions Issued by the Office of Employment Discrimination Complaint Adjudication

FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent, adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final decision or order on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include temporary disabilities, "light duty", "pre-selection", retaliation, religious accommodation, complaints about OWCP claims processing, outdated position descriptions, sanctions for failing to cooperate with EEOC judges, and the distinction between a medical condition and a disability.

Also included are questions and answers pertaining to Title VII's prohibition against national origin discrimination. The Q&As are reprinted from EEOC's newly released guidance on the subject.

The *OEDCA Digest* is also available on the World Wide Web at: http://www.va.gov/orm/oedca.htm.

CHARLES R. DELOBE

I

BROKEN LEG NOT A "DISABILITY"; HENCE MANAGEMENT NOT REQUIRED TO PROVIDE "LIGHT DUTY" ACCOMMODATION

The complainant was hired as a staff nurse at a VA hospital on a temporary appointment, not to exceed one year. About three months later, he was fired for lack of dependability.

The complaint claimed, among other things, that he was fired, not because of a lack of dependability, but rather because of his "leg disability." Shortly after being hired, he suffered a fracture to the tibia and fibula of his left leg. The injury did not occur on the job. He claimed that management failed to accommodate his injury by refusing to provide him with a light duty assignment. Management officials claimed that they had no duty to provide a light duty assignment, as such assignments are reserved for on-the-job injuries.

The investigation revealed that about a month before his leg injury the complainant had failed to report for work on a Monday. He claimed it was because he misread the work schedule. He further claimed that after receiving a phone call from a co-worker asking about his status, he began driving to work but never made it in because he hit a deer, which totaled his vehicle and rendered him too "shook up" to report. About a month later, he suffered the leg fracture.

His supervisor disbelieved the assertion that he misread the schedule because, only a few days earlier, she had asked him to fill in for a coworker on the date in question and he had agreed to do so. Moreover, a short time later, she learned that the story about his vehicle being totaled was untrue.

An EEOC judge found, and OEDCA agreed, that the complainant's dismissal was not due to disability discrimination. The record demonstrated that the complainant did not have a disability because his broken leg was not a permanent condition. His physician released him to work with no physical restrictions three months after the injury, and shortly thereafter he was hired as a staff nurse at a local hospital.

As a general rule, temporary impairments are not considered disabilities, as they do not substantially limit major life activities for an extended period. While it is sometimes possible for a temporary impairment to rise to the level of a disability, the impairment must be long lasting and significantly restrict major life activities for an extended period. That was clearly not the case here.

Because the complainant was not disabled, management had no obligation to "accommodate" his condition. Moreover, even if he were disabled, it was clear from the evidence that his dismissal was for reasons completely unrelated to his medical condition.

A word of caution is in order here. Offi-

cials in this case claimed that they were not required to provide "light duty" because the injury did not occur on the job. They were correct in asserting that they were not required to provide light duty, but not for the reason given.

If a non job-related injury results in a permanent or otherwise long-lasting impairment that significantly restricts a major life activity, management does have an obligation to provide a reasonable accommodation. Moreover, depending on the circumstances of the case, the only effective accommodation available in some cases may be similar or equivalent to a light duty position.[1]

If such is the case, management may not avoid its obligation to accommodate simply by asserting that the injury did not derive from an occupational injury. It would have to provide the accommodation unless it could demonstrate that doing so would impose an undue hardship. The EEOC will not find undue hardship if management refuses to reassign a disabled employee to a vacant light duty position reserved for occupationally-injured employees on the theory that it would then have no other vacant light duty positions available if an employee were injured on the job and needed light duty.

Disability law is clearly the most complex and misunderstood area of civil rights law. As we have previously noted on numerous occasions, managers and supervisors should consult with the Office of Regional Counsel before taking any action, or refusing to take action, in connection with any matter relating to an employee's disability or alleged disability.

[1] See, EEOC Enforcement Guidance: *Worker's Compensation and the ADA*, Q&A 27 through 29 (September 3, 1996).

II

THREE YEAR INTERVAL BETWEEN PRIOR EEO ACTIVITY AND PERSONNEL ACTIONS IN DISPUTE NEGATES ANY INFERENCE OF RETALIATION

An employee filed a complaint of reprisal (*i.e.*, retaliation) concerning some personnel actions and other employment-related matters that adversely affected him in the years 2000 and 2001. He claimed that management took these actions in retaliation for an EEO complaint he had filed three years earlier.

An EEOC judge found no evidence to support the complainant's allegation and issued a decision in favor of the agency. The judge noted that in a retaliation claim, a claimant must first establish a *prima facie* case. In other words, the claimant must present evidence sufficient to show that retaliation may have been a motive. If the claimant establishes a *prima facie* case, management must then articulate a legitimate, nonretaliatory reason for its actions. If management articulates such a reason, the burden then falls on the claimant to prove by a preponderance of the evi-

dence that management's articulated reason is not the true reason, but is instead a pretext to hide a retaliatory motive.

In this case, the judge found that the claimant failed to satisfy her threshold burden of establishing a *prima facie* case. In order to establish a *prima facie* case of reprisal, a claimant must generally show (1) prior EEO activity, (2) awareness of that activity by the responsible management official, (3) a subsequent event or events that adversely affected the claimant, and (4) some evidence of a causal connection between the prior EEO activity and the subsequent event(s). Evidence of a causal connection generally requires proof that the matter complained of occurred within a short period of time after the EEO protected activity.

In this case the EEOC judge correctly found that the prior EEO complaint was too far removed in time to raise an inference that the complaint caused the subsequent events. The judge noted a recent U.S. Supreme Court decision[2] in which the Court stated that mere temporal proximity would only be sufficient to satisfy the causality element of a *prima facie* case if the temporal proximity is "very close." The Court then cited two circuit courts of appeals decisions which held that three and four months between the prior EEO activity and the treatment complained of was not sufficient to establish a *prima facie* case of reprisal. In this case, the three year interval between the earlier complaint and the matters complained of was obviously too long and, hence, precluded the complainant from establishing a *prima facie* case.

[2] *Clark County School District v. Breeden*, 532 U.S. 268, 121 S.Ct. 1508 (2001); 2001 WL 402573 (2001)

III

PRE-SELECTION DUE TO PERSONAL RELATIONSHIP RATHER THAN DISCRIMINATION

An EEOC administrative judge recently ruled in favor of the VA in a claim brought by a male employee who asserted that his failure to be selected for a supervisory computer specialist position was due to gender and age discrimination. The case involved the always-difficult and frequently-raised issue of "preselection."

The complainant was highly qualified for the position he sought. All of the evidence indicated he was an exceptional employee who performed in an exemplary manner and availed himself of every opportunity to advance his career. In this particular promotion action, he made the best-qualified list and was referred to the selecting official (SO). The SO, a female, passed him over in favor of a younger female applicant.

Both the EEOC judge and OEDCA concluded that his nonselection was not due to gender discrimination. The evidence indicated that VA officials

learned after the promotion action that the SO and the selectee had a close personal relationship. They owned property together in three states, shared bank accounts, and listed each other as beneficiary on life insurance and retirement accounts. Local officials referred the matter to the Office of the Inspector General, which conducted an extensive investigation. The IG later issued a report finding, among other things, a serious conflict of interest with regard to the promotion action. The SO and the selectee resigned their positions following the IG's report.

At the hearing the VA acknowledged that the selectee's promotion was improper, but maintained that the complainant was not discriminated against because of his gender. The EEOC judge agreed, noting that the other applicants for this position included males and females in various age groups who were equally disadvantaged by the favoritism. Moreover, the record indicated that the SO had previously made numerous selections of both males and females in various age groups.

Preselection based on favoritism was the obvious reason for the complainant's nonpromotion, and such a reason clearly violates merit principles mandated by civil service laws and regulations. These facts notwithstanding, the complainant was not entitled to the relief he requested because his nonpromotion, however improper and unfair, was not due to gender or age discrimination.[3] Civil rights laws authorize relief only when those laws are violated.

IV

MEDICAL CENTER FAILS TO MAKE REASONABLE EFFORT TO ACCOMMODATE PHYSICIAN'S RELIGIOUS PRACTICE

OEDCA recently found discrimination in a case that illustrates an error that managers and supervisors make when confronted with an employee's request for religious accommodation. The error is failing to make a good faith effort to provide accommodation.

The complainant in this case, a physician (Islam/Muslim), asked the Chief of Medicine at the time he was hired for a work schedule accommodation that would permit him to attend congregational prayer services in nearby communities on Friday afternoons to fulfill his religious obligation. The complainant had to drive approximately 40 miles to the nearest mosque because there was no local mosque that he could attend. Although the Chief of Medicine promised to accommodate him, no actual arrangements were ever made.

The Chief subsequently left the medical center, after which the complainant worked under a succession of new supervisors and managers. He eventually

[3] There was no information in the file concerning reannouncement of the vacancy after the selectee resigned.

renewed his request for an accommodation, but received no response from his new supervisor and manager.

For a while the complainant tried scheduling prayer services at the medical center, but attendance was too low to permit continuance of the practice. Thereafter he again requested accommodation. This time he was told that it was his responsibility to find another physician who was willing to provide coverage for his patients during his absence.

The complainant attempted to attend congregational prayer on Friday afternoons. Management, however, continued to assign patients to him on those afternoons. They would page him during his prayer service, and he was held responsible for his patients while at the service.

To satisfy his religious obligation, he was eventually forced to use his annual leave to attend on those Fridays when he was on duty.

Complainant's manager and supervisor acknowledged that complainant requested religious accommodation. They stated, however, that he did not put his accommodation request in writing. The supervisor claimed that because the request was not in writing, he did not know what time period complainant needed to be off for his Friday afternoon prayer service.

After an incident that resulted from a conflict between complainant's religious obligation and his tour of duty, a third-level supervisor instructed complainant's manager and supervisor to honor his accommodation request and arrange for adequate coverage during his absence. Notwithstanding that instruction, they took no action to accommodate the complainant.

OEDCA concluded from the above facts that management failed to make a good faith effort to accommodate complainant's religious beliefs. Management must provide reasonable accommodation of an employee's religious beliefs unless it demonstrates that doing so would result in an undue hardship on the conduct of its operations. The reasonableness of management's attempt at accommodation will be determined on a case-by-case basis.

Even if it could be argued that management did provide some accommodation in this case, management must provide a *reasonable* accommodation. Whether an accommodation is reasonable will be determined by examining: 1) the alternatives for accommodation considered by management; and 2) the alternatives for accommodation, if any, offered to the complainant. Where there is more than one alternative available, the alternative which least disadvantages the employee with respect to employment opportunities, compensation or the terms, conditions or privileges of employment must be offered.

It is <u>management's</u> obligation to facili-

tate the securing of voluntary substitutes or swaps and considering other alternatives such as flexible work scheduling or compensatory time. Means for facilitating voluntary substitutes and swaps include: 1) publicizing policies regarding accommodation and voluntary substitutions; 2) promoting an atmosphere in which such substitutions are favorably regarded; and 3) providing a central file, bulletin board or other means for matching voluntary substitutes.

In this case, despite instruction from a third-level supervisor, management put the burden solely on complainant to provide coverage for his patients during the time he was attending his religious obligation. There was no evidence in the record of any effort on the part of complainant's manager or supervisor to facilitate voluntary substitutes or swaps, or consider other alternatives such as flexible work scheduling or compensatory time.

The absence of any such effort on the part of complainant's manager and supervisor was unreasonable and ultimately led to a disadvantageous alternative for the complainant, *i.e.*, using his annual leave.

It is not a defense to argue, as management did here, that the accommodation request was verbal rather than written. There is no legal requirement that the request be in writing. If a verbal request is unclear, management must seek clarification rather than simply ignore it.

This case illustrates the importance of addressing employee requests for religious accommodation. A good faith effort should be made to accommodate the employee, which means that all available alternatives that do not result in an undue hardship on operations should be considered. In addition, the reasonableness of the accommodation will be determined by the alternatives considered by management and the alternative offered to the complainant. The alternative that least disadvantages the complainant with respect to employment opportunities must be offered.

V

EEOC JUDGE DISMISSES COMPLAINT ABOUT OWCP PROCESSING DELAYS FOR FAILURE TO STATE A CLAIM

The complainant, who was employed as an electrician, sustained a work-related injury to his right ankle, and thereafter missed approximately seven days of work. He did not report the injury as being work-related until almost a year later, when he filed Form CA-1 (*Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay/Compensation*).

Shortly after he filed his report, the Office of Workers' Compensation Programs (OWCP) denied his claim. Approximately two years later, the OWCP rescinded its denial and accepted the claim based on additional medical in-

formation provided by the complainant's physician. Thereafter, he filed several "CA-7" forms requesting compensation, which he eventually received from the Department of Labor. Because of some delays by the VA in the processing of those forms, he filed a discrimination complaint claiming the delays were due to his disability (*i.e.*, the ankle injury). The agency denied any wrongdoing, stating that the complainant's claims were processed in an appropriate manner, and that he received all payments due him.

An EEOC administrative judge dismissed his EEO complaint for procedural reasons, concluding that the complainant's allegation failed to state a claim. The judge reasoned that the complainant failed to show how he was "aggrieved" by the matters complained of; that is, he failed to show a harm or loss with respect to a term, condition, or privilege of employment. In addition, the judge found that the complainant's claim involved nothing more than a "collateral attack" on the OWCP claim process and, as such, failed again to state a claim. The judge correctly noted that the proper forum for complaining about delays by the VA in the OWCP claims process is the OWCP claims process, not the VA's EEO complaint process.

VI

EEOC JUDGE WARNS AGENCY ABOUT USE OF OUTDATED POSITION DESCRIPTIONS

An EEOC judge recently found in favor of the agency, concluding that a job applicant's failure to be selected for a computer specialist position was not due to his national origin (Hispanic), gender, or age. In so finding, however, the judge cautioned the agency about the problems associated with using outdated position descriptions (PDs).

The complainant applied but was not selected for a GS-13 computer specialist position in the Medical and Support Section of the Financial and Systems Quality Assurance Service (FSQAS). Because a younger, non-Hispanic female was selected, and because he thought he was better qualified for the job, he filed a discrimination complaint.

The selecting official, Chief of the Medical and Support Section, testified that the selectee was better qualified because she was already working in that section and had computer experience and skills in areas pertinent to the job as it was performed in that section. The selecting official further testified that the complainant's expertise and skills were limited to one particular function or area, the VA's "PAID" auditing system, which was unrelated to the job in question and to the function and responsibilities of the Medical and Support Section.

The complainant attempted to rebut the selecting official's explanation by pointing to the position description for the

vacancy, which emphasized, among other things, fiscal and audit-related systems, such as working with the VA's "PAID" system, and noting that the complainant lacked such experience.

Management responded by stating that the PD in question was outdated and generic in nature; a one-size-fits-all description written years earlier to cover any and all computer-related jobs at the GS-13 grade level. Because the computer technology field had changed dramatically since the PD was written, and because of the increase in specialization, it had become virtually useless. It no longer described accurately and specifically the actual duties of a given position.

The judge, after reviewing all of the evidence presented by the parties, agreed with the agency that the PD was outdated and, despite references to audit-related systems, did not support the complainant's claim that he was better qualified than the selectee. The selectee's background and experience in the Medical and Support Section made her the obvious choice.

Although agreeing with the agency that discrimination played no role in the selection, the judge did counsel the agency concerning its responsibility to ensure that PDs are kept current. The judge noted that selection of an applicant whose experience and skills do not match those required by the PD will always warrant "extremely close scrutiny," and that such situations "offer an avenue for discriminatory selections." Fortunately for the agency, this was not a close case, as the selectee was far better qualified than the complainant. Also, management made the effort to demonstrate that the PD was outdated and did not relate to the job in question. Because of these factors, the judge was willing to discount the complainant's argument concerning the PD.

Had this been a close case, however, the outcome might have been different. Likewise, had the selecting official failed to take the time to point out the problem with the PD and demonstrate to the judge's satisfaction what the actual duties of the job were, again the outcome might have been different.

EEOC judges have been known to find discrimination based on PDs that on their face support the complainant's claim of superior qualifications. Unfortunately, outdated and generic PDs are not uncommon, especially in government. Position descriptions inevitably become irrelevant and useless over time due to mission and technology changes, reorganizations, job consolidations, and any number of other events that affect how a specific job is performed within an organization. Unless organization heads take the time to update them, a task that is typically low on their list of priorities, they risk having the outdated PD used against them during an EEO proceeding.

VII

FAILURE TO COOPERATE WITH EEOC ADMINISTRATIVE JUDGE RESULTS IN DEFAULT JUDGMENT IN FAVOR OF THE AGENCY

It is not unheard of for EEO complainants to request a hearing before an EEOC administrative judge and then, for whatever reason, refuse to cooperate with the judge during the hearing process. Such refusal can be costly, as one complainant recently learned.

An EEOC judge assigned to the Houston District Office had scheduled a pre-hearing telephone conference. The complainant failed to make himself available for the conference. The judge therefore ordered the complainant to submit a written explanation for his failure within five calendar days. The judge's order contained a warning that failure to provide an adequate explanation could result in sanctions, including a decision in favor of the VA. The complainant failed to respond to the judge's order. The judge accordingly issued a default judgment in the case, finding no discrimination. Because it was a default judgment, the judge rendered it without discussion or analysis of the facts or law.

Complainants who request hearings, and agencies who participate in such hearings, should realize that EEOC judges have at their disposal a variety of tools, referred to as "sanctions", to ensure that the parties comply with the orders and rules issued or established by the Equal Employment Opportunity Commission and the local judge during the hearing phase of an EEO proceeding. Those tools, or sanctions, include (i) drawing an adverse inference that requested information or testimony would have reflected adversely on the party refusing to provide the information or testimony; (ii) considering the matters to which the requested information or testimony pertains to be established in favor of the opposing party; (iii) excluding other evidence offered by the party failing to produce the requested information or testimony; (iv) issuing a judgment fully or partially in favor of the opposing party (*i.e.*, a default judgment); or (v) taking such other action as appropriate.

In most cases where a complainant fails to cooperate or respond, the judge will "take such other action as appropriate" by remanding the case to the agency for a final decision on the merits. The judge essentially treats the failure to cooperate at the hearing stage as a *de facto* withdrawal by the complainant of his or her hearing request. However, in cases where a complainant's refusal to cooperate amounts to "contumacious" conduct, judges may go so far as to dismiss the complaint in its entirety on procedural grounds, thereby resulting in the complainant not receiving a decision on the merits of his or her complaint (*i.e.*, not receiving a decision on the question of discrimination).

Agency representatives must also be

mindful of a judge's authority to sanction. There have been cases where EEOC judges have issued default judgments against agencies because of their failure to respond fully or in timely fashion to orders or requests by the judge.

VIII

EMPLOYEE'S DIABETIC CONDITION NOT A DISABILITY

An employee recently learned that having a serious medical condition is not the same as being disabled. The employee filed a disability discrimination complaint against the VA concerning a number of job related matters involving discipline and training. After completion of the agency investigation, he requested a hearing before an EEOC judge. The judge held a hearing and thereafter issued a decision finding no discrimination.

The complainant presented medical evidence, which the VA did not challenge, that he had a serious medical impairment, -*i.e.*, diabetes. However, the EEOC judge found that, despite evidence of the condition, the complainant failed to prove that he was an "individual with a disability", as that term is defined in EEO law and regulation.

An "individual with a disability" is one who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such impairment, or (3) is regarded as having such impairment.

"Major life activities" are activities that are of central importance to daily life, and my include, among other things, caring for oneself, manual tasks, walking, seeing, hearing, breathing, learning, and working. An impairment is "substantially limiting" if it prevents an individual from performing a major life activity, or if it significantly restricts the duration, manner, or condition under which an individual can perform a major life activity as compared to the ability of an average person in the general population to perform that same major life activity. For example, a person who cannot walk, or who can only walk for very brief periods of time would be substantially limited in the major life activity of walking.

As can be seen from the above definitions, the determination of whether a person has a disability is not necessarily based on the name or diagnosis of a condition, but rather on the effect that condition has on the life of the individual.

In this case, the complainant was diagnosed with diabetes. Moreover, he presented evidence showing that his condition limited his ability to drive long distances, and required him to eat small meals at certain intervals throughout the day. However, neither the driving limitation nor the frequent meal requirement constituted a substantial limitation of a major life activity. For that reason

he was not "an individual with a disability". Hence, management did not discriminate against him due to a disability.

Again, bear in mind that what matters is the effect of the condition on the individual, and not the name or diagnosis of the condition. The same medical condition – cancer for example – can impact individuals in very different ways, depending on the stage of the disease, the presence of other impairments, and any number of other factors.

The lesson of this case is obvious – proving the existence of a disability requires much more than simply demonstrating the existence of a medical condition.

IX

Q&AS ON NATIONAL ORIGIN DISCRIMINATION - NEW GUIDANCE FROM EEOC

Title VII of the Civil Rights Act of 1964 prohibits employers with at least 15 employees from discriminating in employment based on an individual's national origin. This prohibition also applies to Federal sector employment. National origin discrimination means treating someone less favorably because he or she comes from a particular place, because of his or her ethnicity or accent, or because he or she appears to have a particular ethnic background. National origin discrimination also means treating someone less favorably at work because of marriage or other association with someone of a particular nationality.

The following questions and answers address some of the key issues that small businesses face related to national origin discrimination. While specifically developed for small businesses, the information discussed below applies more generally and will be valuable to anyone interested in Title VII's prohibitions against national origin discrimination.

These questions and answers are adapted from the EEOC's Compliance Manual Section on National Origin Discrimination. Anyone wishing to learn more about national origin discrimination should call 1-800-669-3362 to request a free copy of the National Origin Section, or review it at EEOC's website. Other information is available at the EEOC's national origin Web page.

Employment Decisions

What employment decisions are covered by Title VII?

Examples of employment decisions covered by Title VII include recruitment, hiring, promotion, transfer, wages and benefits, work assignments, leave, training, discipline, layoff, and discharge.

May an employer rely on customer or coworker preference in making employment decisions? For example,

what should an employer do if current employees seem to prefer working with people of certain nationalities but not others?

Customer or coworker perceptions about an individual's ancestry or ethnicity should not be the basis for an employment decision. Employment decisions that are based on the discriminatory preferences of customers or coworkers are just as unlawful as decisions based on an employer's own discriminatory preferences.

What security requirements may an employer impose?

Security requirements may be used as long as they are applied to employees or applicants without regard to national origin. The key is to avoid singling out an individual or group based on national origin when applying security requirements. Other federal law also may require security clearances for sensitive positions. Finally, release of personnel records in accordance with the USA PATRIOT Act does not violate Title VII.

Harassment

When does harassment violate Title VII?

Harassing conduct, such as ethnic epithets or other offensive conduct toward an individual's nationality, violates Title VII when the conduct unreasonably interferes with the affected individual's work performance or creates an intimidating, hostile, or offensive work environment for the affected individual, as illustrated below:

> Muhammad, an Arab-American, works for XYZ Motors, a large automobile dealership. His coworkers regularly call him names like "camel jockey," "the local terrorist," and "the ayatollah," and intentionally embarrass him in front of customers by claiming that he is incompetent. Muhammad reports this conduct to higher management, but XYZ does not respond. The constant ridicule has made it difficult for Muhammad to do his job. The frequent, severe, and offensive conduct linked to Muhammad's national origin has created a hostile work environment in violation of Title VII.

What steps should an employer take to prevent unlawful workplace harassment?

The most important step for an employer in preventing harassment is clearly communicating to employees that harassment based on national origin will not be tolerated and that employees who violate the prohibition against harassment will be disciplined. Other important steps include adopting effective and clearly communicated policies and procedures for addressing complaints of national origin

harassment, and training managers on how to identify and respond effectively to harassment. By encouraging employees and managers to report harassing conduct at an early stage, employers generally will be able to prevent the conduct from escalating to the point at which it violates Title VII.

Language Issues

May an employer ever base an employment action on an individual's foreign accent or limited English proficiency?

An employer may consider an employee's foreign accent if the individual's accent materially interferes with the ability to perform job duties. This assessment depends upon the specific duties of the position in question and the extent to which the individual's accent affects his or her ability to perform job duties. Similarly, an English fluency requirement should reflect the actual level of proficiency required for the position for which it is imposed. The following example illustrates these principles:

> Jorge, a Dominican national, applies for a sales position with XYZ Appliances, a small retailer of home appliances in a non-bilingual, English-speaking community. Jorge has very limited skill with spoken English. XYZ notifies him that he is not qualified for a sales position because his ability to effectively assist customers is limited. However, XYZ offers to consider him for a position in the stock room. Under these circumstances, XYZ's decision to exclude Jorge from the sales position does *not* violate Title VII.

May employers adopt policies that require employees to speak only English in the workplace?

An English-only rule may be used if it is needed to promote the safe or efficient operation of the employer's business. Some situations in which business necessity would justify an English-only rule include: communications with customers, coworkers, or supervisors who only speak English; emergency situations in which workers must speak a common language to promote safety; and cooperative work assignments in which a common language is needed to promote efficiency. An employer's use of an English-only rule should relate to specific circumstances in the workplace.

Other Issues

What types of dress codes may an employer adopt?

A dress code must not treat some employees less favorably because of their national origin. For example, a dress code that prohibits certain kinds of ethnic dress, such as traditional African or Indian attire, but otherwise permits casual dress would treat some employees less favorably because of

their national origin. An employer may require all workers to follow a uniform dress code even if the dress code conflicts with some workers' ethnic beliefs or practices. However, if the dress code conflicts with *religious* practices, the employer must modify the dress code unless doing so would result in undue hardship.

May an employer require U.S. citizenship?

Citizenship requirements generally do not violate Title VII. Like other employment policies, however, citizenship requirements may not be adopted for discriminatory reasons. Citizenship requirements also must be enforced evenhandedly. For example, an employer may not refuse to hire Egyptian citizens for certain positions based on their lack of U.S. citizenship while hiring British citizens for the same positions. In addition, while Title VII does not prohibit citizenship discrimination, the Immigration Reform and Control Act of 1986 (IRCA) prohibits employers with four or more employees from discriminating because of citizenship status with respect to hiring, referral, or discharge. IRCA's nondiscrimination requirements are enforced by the Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, at the U.S. Department of Justice.

Does Title VII's prohibition against national origin discrimination also apply to American-born employees?

Title VII protects every employee or applicant **against** discrimination based on his or her own national origin, including people born in the United States.

Are foreign nationals protected by Title VII?

Foreign nationals employed in the United States are protected by Title VII to the same extent as U.S. citizens. However, because of immigration policy, the remedies available to an individual without proper work authorization may be limited.

What should an employer do when someone has complained about national origin discrimination?

Employers should investigate and seek to resolve any complaint of discrimination by a worker. Employers should remember that in all cases, it is unlawful to retaliate against a worker who makes a complaint of discrimination in the workplace.